

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Reduce Government: This PCB increases the procedural requirements related to prosecuting a civil action against a motor vehicle dealer under the Florida Deceptive and Unfair Trade Practices Act.

B. EFFECT OF PROPOSED CHANGES:

Background

Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA")¹ was enacted "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."²

Businesses and individuals are afforded broad protection from unfair or deceptive acts or practices under FDUTPA. FDUTPA states a broad proscription, which applies through civil enforcement across industries and business conduct generally in any medium. The definition of "trade or commerce" in s. 501.203, F.S., on its face encompasses all advertising, soliciting, providing, offering, or distributing without limitation as to medium or subject matter. FDUTPA prohibits such acts in "any trade or commerce,"³ except as specifically exempted in chapter 501, F.S.

Claims under FDUTPA can generally be brought either by the state through a state attorney or the Attorney General acting as "the enforcing authority,"⁴ or by a private party who has allegedly suffered actual losses resulting from a FDUTPA violation.

Current law does not require a potential plaintiff contemplating a FDUTPA action to send a demand letter and attempt to settle the action before filing suit against a motor vehicle dealer.

Unfair or Deceptive Acts or Practices Relating to Vehicles

Part VI of chapter 501, F.S., currently consists of only ss. 501.975 and 501.976, F.S., and applies FDUTPA specifically to a motor vehicle dealer, whom s. 501.975(2), F.S., defines as being "a motor vehicle dealer as defined in s. 320.27, F.S."

Section 501.976, F.S., lists activities and practices by a motor vehicle dealer that constitute unfair or deceptive trade practices under FDUTPA. The section further provides a court should consider the amount of actual damages when evaluating an award of attorney's fees for any other of the listed violations, but otherwise provides no additional procedural requirements for bringing a private-party FDUTPA claim against a motor vehicle dealer for such practices.

Effect of Proposed Changes

In an effort to reflect the current FDUTPA provisions in the unfair or deceptive acts or practices (part VI of chapter 501, F.S.) relating to motor vehicles, the bill mirrors several sections of the FDUTPA as

¹ Sections 501.201-501.213, F.S.

² Section 501.202(2), F.S.

³ Section 501.204(1), F.S.

⁴ Section 501.203(2), F.S.

provided in part II, chapter 501, F.S., and creates those provisions relating to motor vehicles in part VI, of chapter 501, F.S. For instance:

- section 2 reproduces s. 501.204, F.S., relating to unlawful acts and practices, and how the section is to be construed;
- section 4 reproduces s. 501.2077, F.S., relating to violations involving a senior citizen or handicapped person, and the civil penalties for such a violation;
- section 5 largely reproduces s. 501.211, F.S., relating to other individual remedies;
- section 6 reproduces s. 501.213, F.S., relating to the effect on other remedies; and
- section 7 is essentially the same as s. 501.2105, F.S., relating to the awarding of attorney's fees and how the fees are determined.

Section 501.979, F.S., specifies that the trial court shall consider actual damages in relation to the time spent when evaluating the reasonableness of an award of attorney's fees to a private person. This language is reproduced from s. 501.975(19), F.S.

The bill also adds the requirement that an individual first send the potential defendant a demand letter prior to filing a civil action under FDUTPA against a motor vehicle dealer⁵. The applicable statute of limitations period for an action under FDUTPA is tolled by the mailing of the demand letter required by this section for 15 business days for an individual claim. The language relating to the demand letter process is comparable to the language currently found in s. 627.736(11), F.S., the Personal Injury Protection statute.

Consumers retain their right to pursue other remedies such as the Lemon Law found in ch. 681, F.S., and causes of action such as breach of contract and fraud, which do not require notice under this act. The bill specifically applies only to claims under the Unfair or Deceptive Acts or Practices part (part VI, ch. 501, F.S.).

Further, this bill requires the Department of Legal Affairs (DLA) to prepare a form demand letter to incorporate the information required in subsection (2) and to prepare an explanation of FDUTPA's dealer provisions. The form demand letter and explanation of FDUTPA's dealer provisions is to be made available to the public by the DLA and provided by the dealer to the customer at the time of the transaction. The form provided by the dealer must include the address where the demand letter must be sent. Failure by the dealer to provide the required information constitutes waiver of the required notice.

Pre-Suit Notice Process

At least 15 business days before a potential claimant may sue for a FDUTPA violation, the claimant must provide a dealer with written notice of the claimant's intent to initiate litigation. This good faith written notice by the claimant must:

- Indicate it is a demand pursuant to s. 501.98, F.S.;
- State the name, address, telephone number of the claimant and the name and address of the dealer;
- Describe the facts and how the facts give rise to a violation of FDUTPA;
- Be accompanied by a copy of all documents in the claimant's possession upon which the claim is based; and
- Include a statement describing each item of actual damage and the amount claimed.

The notice must be sent by certified mail, return receipt requested, to the dealer.

If the dealer pays the claim in the notice within 15 business days, together with a surcharge of 10 percent of the amount requested in the demand letter (not to exceed \$500), then the plaintiff may not

⁵ It should be noted, however, these conditions do not apply to actions brought by a State Attorney or DLA (the enforcing authorities).

initiate litigation against the dealer under this section. This provision is similar to the one found in the Personal Injury Protection statute, s. 627.736(11), F.S., which provides for a penalty of 10 percent of the amount paid by the insurer, not to exceed \$250, when the insurer pays an overdue claim.

A dealer is not required to pay attorney's fees if:

- The dealer, within 15 business days after receiving the notice, notifies the claimant in writing, and a court or arbitrator agrees, the amount claimed is not supported by the facts of the transaction or by generally accepted accounting principles, or includes items not properly recoverable under this part; or
- The claimant fails to substantially comply with this section.

A payment by the dealer will be treated as being made on the date a draft or other valid instrument equivalent to payment is placed in the U.S. mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of actual delivery. The claimant is not entitled to a surcharge in any proceeding initiated against a dealer under this part if the dealer rejects or ignores the notice of claim.

A dealer's offer to pay, or payment of, a claimant's actual damages does not constitute an admission of any wrongdoing and is not admissible to prove the dealer's liability or absence of liability. Moreover, such an offer or payment releases the dealer from any further liability under FDUTPA arising out of the event described in the notice.

The provisions requiring the demand letter do not apply to any claim for actual damages brought and certified as a maintainable class action or to any action brought by the enforcing authority.

If the claimant initiates litigation without having complied with the outlined procedures, the court is permitted to abate litigation until the claimant has complied with the required procedures and the dealer has been allowed the opportunity to accept or reject the demand.

The provisions found in part VI of chapter 501, F.S. do not apply to:

- An act or practice required or specifically permitted by federal or state law.
- A claim for personal injury or death or a claim for damage to property other than property that is the subject of the consumer transaction.
- Any person or activity regulated under the laws administered by the Office of Insurance Regulation.
- Any person or activity regulated under the laws administered by the Department of Financial Services.

A claim brought by a person, other than the enforcing authority, against a dealer is now precluded under part II of chapter 501, F.S., and must be pursued through part VI of chapter 501, F.S.

C. SECTION DIRECTORY:

Section 1. Amends s. 501.975, F.S., providing definitions for part VI of chapter 501, F.S., Unfair or Deceptive Acts or Practices; Vehicles.

Section 2. Creates s. 501.9755, F.S., declaring that unfair methods of competition, unconscionable acts or practices used by motor vehicle dealers are unlawful; providing legislative intent.

Section 3. Amends s. 501.976, F.S., revising language concerning actionable, unfair, or deceptive acts or practices by dealers.

Section 4. Creates s. 501.9765, F.S., describing violations against senior citizens and handicapped persons; providing civil penalties for those violations.

Section 5. Creates s. 501.977, F.S., providing additional individual remedies.

Section 6. Creates s. 501.978, F.S., providing the effect of other remedies.

Section 7. Creates s. 501.979, F.S., providing for attorney's fees.

Section 8. Creates s. 501.98, F.S., describing the demand letter provisions.

Section 9. Creates s. 501.99, F.S., providing application of certain provisions.

Section 10. Amends s. 501.212, F.S., exempting certain claims against motor vehicle dealers from the provisions of part II of chapter 501, F.S.

Section 11. Provides this bill is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that the bill allows consumer claims against motor vehicle dealers to be resolved prior to a FDUTPA suit being filed, the costs associated with litigation will be avoided.

D. FISCAL COMMENTS:

There will be minimal nonrecurring fiscal costs to the Department of Legal Affairs in FY 2007-08 related to preparing a sample notice for the public's use.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

According to the Florida Automobile Dealers Association, prior to 2001 attorneys would send a car dealer a pre-suit demand letter affording the dealer an opportunity to resolve a customer's claim before filing a lawsuit. However, since the 2001 amendments to Florida's Deceptive and Unfair Trade Practice Act the dealers assert that pre-suit demands are seldom made.

Currently, there is no pre-suit notification requirement for claims against car dealers (as there are, for example, in medical malpractice, P.I.P. claims, and construction industry claims). The bill gives a car dealer 15 business days to recognize a claim or not contest a claim, and attempt to resolve a customer's request for compensation.

D. STATEMENT OF THE SPONSOR

N/A

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 29, 2007 this PCB was considered by the Economic Expansion and Infrastructure Council. Three amendments were adopted.

Amendment one simplified the required content of the claimant's demand letter.

Amendment two required the Department of Legal Affairs to prepare an explanation of part VI, ch. 501, F.S., in addition to the form demand letter and make both available to the public. Motor vehicle dealers are required to provide both documents to customers at the time of transaction. The amendment required the dealer to include on the form demand letter the address where the letter must be sent. Also, the amendment specified that failure by the dealer to provide the required information constitutes waiver of the required notice.

Amendment three removed all references to "30 days" and inserts "15 business days".

The PCB was reported favorably.